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Nos. 09-958, 09-1158, and 10-283

In the Supreme Court of the United States

TOBY DOUGLAS, DIRECTOR OF THE
DEPARTMENT OF HEALTH CARE SERVICES,
STATE OF CALIFORNIA, PETITIONER
v.
INDEPENDENT LIVING CENTER OF SOUTHERN CALIFORNIA, INC.,
A NONPROFIT CORPORATION, ET AL.

TOBY DOUGLAS, DIRECTOR OF THE
DEPARTMENT OF HEALTH CARE SERVICES,
STATE OF CALIFORNIA, PETITIONER
v.
CALIFORNIA PHARMACISTS ASSOCIATION, ET AL.

TOBY DOUGLAS, DIRECTOR OF THE
DEPARTMENT OF HEALTH CARE SERVICES,
STATE OF CALIFORNIA, PETITIONER
v.
SANTA ROSE MEMORIAL HOSPITAL, ET AL.

ON WRITS OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

BRIEF OF *AMICI CURIAE* MICHIGAN AND 30 OTHER STATES SUPPORTING PETITIONER

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QUESTION PRESENTED

Whether Medicaid recipients and providers may maintain a cause of action under the Supremacy Clause to enforce § 1396a(a)(30)(A) by asserting that the provision preempts a state law that may reduce payments to providers.

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INTEREST OF *AMICI CURIAE*

The *amici* states administer jointly-funded federal-state programs, such as Medicaid, adoption assistance, and food assistance, in partnership with federal agencies. The financial impact of these programs on state budgets is astronomical. Take Medicaid, for instance. In fiscal year 2009, Michigan's total Medicaid spending exceeded $10.5 billion and consumed more than 18% of Michigan's general fund spending. The same year, California's total Medicaid spending exceeded $41.6 billion and consumed nearly 13% of California's general fund spending. And these costs are increasing far faster than inflation. In the midst of one of the country's worst economic crises in history, Medicaid spending nationwide rose from $338 billion in federal fiscal year 2007, to $359 billion in 2008, and to $387 billion in 2009.

Given the vast amounts of money at stake and the complexity of the Medicaid program, Congress has wisely delegated to the U.S. Department of Health & Human Services' Centers for Medicare & Medicaid Services (CMS) the authority to regulate this complex and highly technical subject matter, including provider-reimbursement rates. This litigation asks whether CMS will continue to be the arbiter of state Medicaid plans, or whether every discretionary decision states make in allocating Medicaid monies will instead be subject to enforcement by potentially millions of private litigants and court injunctions.

Here, the Ninth Circuit concluded that (1) there is no private right to enforce 42 U.S.C. § 1396a(a)(30)(A), but (2) the Supremacy Clause allows private litigants to sue anyway. Such a ruling, if affirmed, would invite

private litigants to sue the *amici* states not only over Medicaid-reimbursement decisions, but a whole host of other federal-state programs, contrary to Congress's intent. And the inevitable result of such lawsuits would be more court orders compelling the states to increase spending for the affected programs. Such judicial intervention destroys the delicate balance that Congress established between the states and federal agencies, creates significant risks to state budgets based on unpredictable court interpretations, and disrupts the smooth and efficient operation of federal-state programs.

The *amici* states respectfully request that the Court reverse the judgments below and affirm that it is inappropriate for the courts to allow private enforcement of a federal statute under the Supremacy Clause, when Congress has not clearly indicated in the statutory language its intent to create an individual right that a specific plaintiff may enforce.

INTRODUCTION AND SUMMARY OF ARGUMENT

This case raises the fundamental question of whether the Supremacy Clause can be used to privately enforce a federal statute after the courts have concluded that Congress did not intend private enforcement of that statute. Incredibly, the Ninth Circuit answered that question "yes." Pet. App. 83 ("a party may seek injunctive relief under the Supremacy Clause regardless of whether the federal statute at issue confers any substantive rights on would-be plaintiffs."). This Court should reverse for three reasons.

First, the Ninth Circuit's view usurps legislative authority. Only Congress has the power to create a private right of action to enforce a federal law. *Alexander* v. *Sandoval*, 532 U.S. 275, 286 (2001). Accordingly, when a statute does not display congressional intent to create both a private right and a private remedy, "a cause of action does not exist and courts may not create one, no matter how desirable that might be as a policy matter, or how compatible with the statute." *Id.* at 286–87.

Second, it is already well established by this Court's precedent that the Supremacy Clause, on its own, cannot create a cause of action when Congress has declined to do so. "[T]hat clause is not a source of any federal rights"; it "'secure[s]' federal rights by according them priority whenever they come in conflict with state law." *Golden State Transit Corp.* v. *City of Los Angeles*, 493 U.S. 103, 107 (1989) (quoting *Chapman* v. *Houston Welfare Rights Org.*, 441 U.S. 600, 613 (1979)). There is no compelling reason to overrule this well-settled precedent.

Third, the practical result of the Ninth Circuit's ruling is to transform private litigants into federal attorneys general of great destructive force, with the power to enforce their own interpretations of virtually any federal statute, regardless of whether Congress intended a private cause of action. Upholding the Ninth Circuit's decision would have a profound effect on principles of federalism and administrative deference, forcing the *amici* states to defend actions in circumstances where Congress chose to vest enforcement authority exclusively in an expert federal agency rather than private litigants. For all these

reasons, the *amici* states respectfully request that this Court reverse the Ninth Circuit and reaffirm that the Supremacy Clause does not provide private rights of action.

ARGUMENT

I. Only Congress has the power to create a private cause of action, and Congress declined to do so in § 1396a(a)(30)(A).

A. Under this Court's precedent, a plaintiff suing under a federal statute must show that Congress intended to create a private right of action to enforce that statute.

The question of whether a federal statute should be subject to private enforcement is a quintessential legislative judgment. "Like substantive federal law itself, private rights of action to enforce federal law must be created by Congress." *Alexander* v. *Sandoval*, 532 U.S. 275, 286 (2001). If federal courts were allowed to ignore congressional commands and choose for themselves which federal requirements may be enforced by private litigants, they would assume the legislative role, substituting their own intent for that of Congress. See *id.* at 287 ("'Raising up causes of action where a statute has not created them may be a proper function for common-law courts, but not for federal tribunals.'") (quoting *Lampf, Pleva, Lipkind, Prupis & Petigrow* v. *Gilbertson*, 501 U.S. 350, 365 (1991) (Scalia, J., concurring in part and concurring in the judgment)); *The Federalist No.* 78, at 466 (Alexander Hamilton) ("'there is no liberty, if the power of judging be not separated from the legislative and executive

powers'") (quoting Montesquieu, *The Spirit of the Laws*).

This Court's precedent has honored the vital distinction between legislative and judicial power in considering when causes of action exist to enforce federal rights. Beginning with *Cort* v. *Ash*, 422 U.S. 66, 78 (1975), this Court articulated a multi-factor test for determining when a federal statute is privately enforceable, identifying congressional intent as one of the primary considerations for determining whether a private remedy is implicit in a statute. *Id.* at 78 ("is there any indication of legislative intent, explicit or implicit, either to create such a remedy or to deny one?").

Only a few years later, in *Cannon* v. *Univ. of Chicago*, 441 U.S. 677 (1979), the Court reiterated the primacy of congressional intent, noting that "the right- or duty-creating language of the statute has generally been the most accurate indicator" of the existence of a private right of action. *Id.* at 690 n.13. Then-Justice Rehnquist's concurring opinion emphasized the primacy of the statutory language, stating, "The question of the existence of a private right of action is basically one of statutory construction." *Id.* at 717 (Rehnquist, J., concurring).

Two years later, the Court affirmed those principles in a pair of opinions, *Pennhurst State Sch. and Hosp.* v. *Halderman*, 451 U.S. 1 (1981), and *Cal.* v. *Sierra Club*, 451 U.S. 287 (1981). In holding that 42 U.S.C. § 6010 does not create substantive rights, this Court in *Pennhurst* concluded that the statute was designed to share responsibility between the federal government and the states. *Id.* at 22. Accordingly,

"Congress must express clearly its intent to impose conditions on the grant of federal funds so that the states can knowingly decide whether or not to accept those funds," particularly where a state faces potentially "indeterminate" obligations. *Id.* at 24. This Court noted that the typical remedy for a state's noncompliance with Spending Clause legislation was termination of funds by the federal agency. *Id.* at 28. Since states can only determine their federal obligations by reference to Congress's clearly-expressed intent, it follows that the states should not be saddled with private lawsuits where the statute does not provide for them. *Id.*

In *Sierra Club*, this Court refused to recognize a private right of action under 33 U.S.C. § 403. 451 U.S. at 289–90. Relying on the four-part *Cort* test, this Court held that § 403 enacted a general ban on certain activities; it did not focus on a particular class of beneficiaries nor did it confer any rights on a particular group. *Id.* at 294. Federal courts "will not engraft a remedy on a statute . . . that Congress did not intend to provide." *Id.* at 297.

Decisions in the 1990s further reinforced this precedent. E.g., *Suter* v. *Artist M.*, 503 U.S. 347, 350 (1992) (careful examination of the Adoption Assistance and Child Welfare Act's language showed that "the Act does not create an enforceable right."); *Blessing* v. *Freestone*, 520 U.S. 329, 341 (1997) (no private right of action under Title IV-D of the Social Security Act; in making that determination, the Court must focus "on congressional intent.").

The case law culminated in *Alexander* v. *Sandoval*, discussed above, and *Gonzaga Univ.* v. *Doe*, in which

this Court articulated a strict, three-part test to determine whether Congress created an individual right that a specific plaintiff may enforce under 42 U.S.C. § 1983. *Gonzaga Univ.* v. *Doe*, 536 U.S. 273, 283 (2002). Under that test, a statute only gives rise to a private right of action where it contains express rights-creating language, speaks in terms of individuals rather than institutional policy, and private enforcement is not incompatible with the statutory scheme. Only where Congress has spoken "in clear and unambiguous terms" does a party have a private right of action to enforce a Spending Clause statute.[1] *Id.* at 290.

In sum, this Court's jurisprudence appropriately looks to congressional intent as expressed in the plain, statutory language to determine whether Congress created an individual right that a specific plaintiff may enforce. Separation-of-power principles could survive nothing less. This Court should reject the Ninth Circuit's approach, a regime that would render congressional intent irrelevant and wholly subservient to the self-serving statutory interpretations of private parties backed by court injunctions.

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[1] See also *Verizon Md. Inc.* v. *Public Serv. Comm'n*, 535 U.S. 635, 644 (2002), where this Court observed: "nothing in the Act displays any intent to withdraw federal jurisdiction under § 1331; we will not presume that the statute means what it neither says nor fairly implies." The courts thus look to *Congress* to identify whether a particular statute confers a private of action.

B. Congress did not intend to create a private right of action for alleged violations of § 1396a(a)(30)(A).

Seven of the eight Circuits that have addressed the question since this Court decided *Gonzaga* have concluded that Congress did *not* intend that Medicaid providers or beneficiaries would have the right to enforce § 1396a(a)(30)(A) in a § 1983 action. *Long Term Care Pharmacy Alliance* v. *Ferguson*, 362 F.3d 50, 56–59 (1st Cir. 2004) (not enforceable by providers); *N.Y. Ass'n of Homes & Servs. for the Aging, Inc.* v. *DeBuono*, 444 F.3d 147 (2d Cir. 2006) (not enforceable by providers); *Pa. Pharmacists Ass'n* v. *Houstoun*, 283 F.3d 531, 541–42 (3d Cir. 2002) (not enforceable by providers) (Alito, J.); *Equal Access for El Paso, Inc.* v. *Hawkins*, 509 F.3d 697, 702–03 (5th Cir. 2007) (not enforceable by beneficiaries of services or providers); *Westside Mothers* v. *Olszewski*, 454 F.3d 532, 541–43 (6th Cir. 2006) (not enforceable by providers or recipients of services); *Sanchez* v. *Johnson*, 416 F.3d 1051, 1062 (9th Cir. 2005) (not enforceable by providers or recipients of services); *Manday R. ex rel. Mr. & Mrs. R.* v. *Owens*, 464 F.3d 1139, 1146–48 (10th Cir. 2006) (not enforceable by providers or recipients of services); but see *Pediatric Specialty Care, Inc.* v. *Ark. Dep't of Human Servs.*, 443 F.3d 1005, 1013–16 (8th Cir. 2006).[2] And while Congress has the power to respond to these rulings by changing the law to create private rights of action, it has steadfastly refused to do

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[2] In *Minnesota Pharmacists Assoc.* v. *Pawlenty*, 690 F. Supp. 2d 809 (D. Minn. 2010), the court concluded that the Eighth Circuit's holding in *Pediatric Specialty Care*—that § 1396a(a)(30)(A) is privately enforceable—is inconsistent with this Court's decision in *Gonzaga*.

so, despite undertaking the broadest overhaul of healthcare regulation in the nation's history.

That congressional prerogative is well founded. When a state administers a public assistance program in conjunction with a federal agency, that agency should be the principal enforcer of the statute, regulations, and other directives. Each such federal agency has multiple tools to assure the state's compliance, the principal of which is its authority to withhold federal funds. Although Congress may intend that particular statutory provisions be subject to private enforcement through litigation, such lawsuits should be strictly limited to those based on provisions that unambiguously provide for private enforcement. 42 U.S.C. § 1396a(a)(30)(A) is not one of these provisions. Nor does the Supremacy Clause magically endow Medicaid providers and recipients with the authority to enforce this provision.

Instead, applying this Court's precedent, a private party can only secure judicial enforcement of provisions in which Congress has created an individual "right" that is enforceable by that party. Regardless of whether a plaintiff seeks to pursue his or her claim under the federal statute directly, § 1983, or any other potential vehicle, such enforcement should only be allowed to proceed consistent with congressional intent. Any other outcome would mean that important political questions are resolved outside the open debate of the democratic process. Such a debate at the time of § 1396a(a)(30)(A)'s enactment, for example, would have assuredly been robust had anyone suggested that Medicaid providers had a private right of action to enforce the provision.

II. The Supremacy Clause should not be used to create a private right of action where Congress chose not to provide one.

In *Golden State Transit Corp.* v. *City of Los Angeles*, this Court expressly rejected the Supremacy Clause as a source of any privately enforceable rights. *Golden State Transit Corp.* v. *City of Los Angeles*, 493 U.S. 103, 107–10 (1989). Specifically, the Court stated that "the Supremacy Clause, of its own force, does not create rights enforceable under § 1983." Rather, the Supremacy Clause merely "'secure[s]' federal rights by according them priority whenever they come in conflict with state law." *Id.* at 107 (quoting *Chapman* v. *Houston Welfare Rights Org.*, 441 U.S. 600, 613 (1979)).

It would therefore "obviously be incorrect" to recognize a federal right of action whenever a federal statute or regulation preempts state law. *Golden State*, 493 U.S. at 108. A party may not invoke the Supremacy Clause to provide a rule of decision unless he or she is otherwise properly before the court. Accord, e.g., *Chapman* v. *Houston Welfare Rights Org.*, 441 U.S. 600, 613 (1979) (noting that the Supremacy Clause "'secure[s]' federal rights by according them priority whenever they come in conflict with state law").

The Court should not revisit its Supremacy Clause precedent. If the Supremacy Clause, on its own, created a stand-alone action based on preemption, then every provision in the United States Code would implicitly authorize a private cause of action against a state or local governmental defendant. As discussed in Section I, *supra*, such a concept would usurp

Congress's authority to say not only what the law is, but who has the right to enforce it.

Equally important, the Ninth Circuit's interpretation of the Supremacy Clause intrudes on executive branch authority. Here, as in many federal-state partnerships, Congress authorized an expert agency to interpret and enforce statutory requirements not only by promulgating regulations, but by approving state plans. E.g., 42 U.S.C. § 1396a(a) (to qualify for federal financial assistance, participating Medicaid states must submit to the Secretary, and the Secretary must approve, "a plan for medical assistance").[3]

Under the Ninth Circuit's reasoning, however, every person or entity with standing is a private attorney general, able to enforce federal statutes or regulations whenever someone believes a state is violating federal law. Allowing a Supremacy Clause action requires the federal courts to resolve questions that Congress thought best suited to resolution by federal agencies with technical knowledge and firsthand experience in the regulated area. Moreover, private litigation will inevitably produce inconsistent

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[3] In other words, no state or state official violates federal law by administering a Medicaid program that fails to qualify for federal reimbursement. Nor do they violate federal law by provoking or daring the Secretary to withhold federal funds. It is impossible for state officials to "violate" the Medicaid Act. Only the Secretary can violate the Act—by approving federal reimbursement for a state program that fails to satisfy the criteria listed in 42 U.S.C. § 1396a. Accord *Pennhurst*, 451 U.S. at 28 ("In legislation enacted pursuant to the spending power, the typical remedy for state noncompliance with federally imposed conditions is not a private cause of action for noncompliance but rather action by the Federal Government to terminate funds to the State.").

results in an area where Congress delegated enforcement authority to a federal agency to ensure uniformity. Cf. *Conboy* v. *AT&T Corp.*, 241 F.3d 242, 253 (2d Cir. 2001) ("[A] private right of action would place the [agency's] 'interpretative function squarely in the hands of private parties and some 700 federal district judges, instead of in the hands of the [agency and] . . . would . . . deprive the [agency] of necessary flexibility and authority in creating, interpreting, and modifying . . . policy.'") (quoting *New England Tel. & Tel. Co.* v. *Public Utils. Comm'n*, 742 F.2d 1, 6 (1st Cir. 1984) (Breyer, J.).

These considerations militate strongly in favor of maintaining the Court's precedent and the Framers' vision: the Supremacy Clause is a choice-of-law provision, not an affirmative grant of individual rights.

III. Allowing "Supremacy Clause lawsuits" to enforce federal Medicaid laws will be a financial catastrophe for states.

Principles of agency deference and separation of powers militate strongly against a regime whereby federal courts may thwart congressional will and create causes of action via the Supremacy Clause. But conditions on federal funding also implicate federalism, a concern heightened by the *amici* states' current fiscal crisis and the vast size of their Medicaid programs.

Only two years ago, this Court emphasized that federal courts should be cautious when dictating how states spend their limited funds:

> Federalism concerns are heightened when, as in these cases, a federal court decree has the

> effect of dictating state or local budget priorities. States and local governments have limited funds. When a federal court orders that money be appropriated for one program, the effect is often to take funds away from other important programs.

Horne v. *Flores*, 129 S. Ct. 2579, 2593–2596 (2009).[4]

The reality is that many states continue to experience severe budget shortfalls. In 2010-11, 43 states face budget shortfalls ranging up to 30% of their general fund budgets: "While states attempted to close their budget gaps through a variety of measures, including budget cuts, tax increases or taking money from rainy day funds, they face at least a combined $127 billion gap through fiscal 2012."[5]

Meanwhile, Medicaid budgets are growing rapidly: "During the worst economic downturn our nation has experienced since the great depression, national Medicaid spending rose from $338 billion in federal

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[4] The Court cited the Equal Educational Opportunities Act, which requires states to take "appropriate action to overcome language barriers" in schools, 20 U.S.C. § 1703(f). 129 S. Ct. at 2588.

[5] Http://sunshinereview.org/index.php/State_budget_issues,_2010-2011# (as visited 3/29/11) ("In addition, the funds given to states also included large expansion of Medicaid to cover the health care of unemployed workers and single workers without children. In 2011, when the federal funds run out, states will be stuck with one million more people on Medicaid with no money to pay for it. The estimated increase from the temporary increase in the Federal Medicaid Assistance Percentage (FMAP) from ARRA is $87 billion over the 27 months which began October 2008 and ends December 2010. Medicaid enrollment increased by 6.0 percent during fiscal 2009.").

fiscal year 2007 to $359 billion in 2008 and to $387 billion in 2009. This represents increases of 6.4 percent and 7.7 percent respectively."[6] Faced with this financial tsunami, the *amici* states must make difficult choices regarding the programs they administer.

One of these critical choices involves the states' costs for maintaining their Medicaid programs, which increase because: (A) the costs of health care are rising nationwide;[7] and (B) the number of persons eligible for Medicaid is increasing. States may seek to reduce their Medicaid costs through several means, e.g., cuts in provider-reimbursement rates or the elimination of "optional" areas of Medicaid coverage. As a rule, if these proposed reductions are acceptable to the U.S. Department of Health & Human Services' Centers for Medicare & Medicaid Services (CMS), the states may implement them without judicial intervention.

But under the Ninth Circuit's approach, parties may obtain judicial court rulings, and obtain court injunctions, even before CMS has had a chance to review the state action at issue and provide its own interpretation. In the present cases, for example, California has been compelled to pay more than one billion dollars in additional Medicaid funds pursuant to

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[6] http://www.kff.org/medicaid/upload/8152.pdf (as visited 3/29/11), at p. 1.

[7] In Michigan, "Federal Funds Information for States (FFIS) has estimated the gross cost of the Medicaid expansion in Michigan to be $1.8 billion by 2017 and $2.0 billion by 2019." Michigan State Fiscal Agency, "Fiscal Analysis of The Federal Health Reform Legislation," April 2010, http://www.senate.michigan.gov/sfa/Publications/Issues/HealthReform/FedHealthReformLegislation.pdf (as visited 3/29/11), at p. 5.

court interpretations of § 1396a(a)(30)(A) that the federal government has rejected. Such a regime creates immense budgetary uncertainty at a time when states can least afford it. And the Ninth Circuit's approach places the power of enforcement in the hands of millions of potential private parties rather than the federal agency that Congress chose to regulate the technical and complex Medicaid program. The courts should respect Congress's decision to leave Medicaid enforcement to CMS, and private enforcement of federal statutes should be limited to those where Congress has unambiguously created a private right of action.

CONCLUSION

The judgments below should be reversed.

Respectfully submitted,

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